Supreme Court, U.S.
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No. 97-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CITY OF BIRMINGHAM, ALABAMA,
Petitioner,
v.
SCOTT THOMAS MORRO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the "policy or custom" limitation on municipal liability under 42 U.S.C. § 1983 a "defense", or is it an element of the cause of action which plaintiff must prove?

2. Can a municipal defendant be said to have waived the "policy or custom" rule of liability by not specifically mentioning it in the Fed. R. Civ. P. 16 pretrial order, as though it were an affirmative defense—or is the issue preserved if the municipality (a) raises the issue in a motion to dismiss; (b) denies, in its answer, the plaintiff's allegation of municipal policy; (c) raises the issue in a motion for summary judgment; (d) denies, in the Fed. R. Civ. P. 16 pretrial order, the plaintiff's allegations (including municipal policy); *and* (e) raises the issue in a motion for judgment as a matter of law under Fed. R. Civ. P. 50?

3. Can a municipality be liable under 42 U.S.C. § 1983 for a disciplinary suspension imposed on an employee by a municipal official, where that suspension was reviewable—and indeed was reviewed and reversed—by a personnel board under state and local law?

LIST OF PARTIES

Petitioner, which was Defendant below, is the City of Birmingham, Alabama. Respondent, who was Plaintiff below, is Scott Thomas Morro. Former Chief of Police Arthur Deutsch was a Defendant in his individual capacity and his official capacity, and Chief of Police Johnnie Johnson was a Defendant in his official capacity; but all claims against them were dismissed and they are therefore not parties in the present posture of the case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW IS NECESSARILY BASED ON THE VIEW THAT THE *MONELL* "POLICY" LIMITATION ON MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 IS A DEFENSE RATHER THAN AN ELEMENT OF PLAINTIFF'S CLAIM	7
II. THIS COURT AND OTHER COURTS HAVE REJECTED THE VIEW THAT THE *MONELL* "POLICY" ISSUE IS AN AFFIRMATIVE DEFENSE, HOLDING INSTEAD THAT IT IS AN ELEMENT WHICH THE PLAINTIFF MUST PROVE; THIS IS AN IMPORTANT ISSUE AS TO WHICH THIS COURT SHOULD RESOLVE THE CONFLICT	13
CONCLUSION	15

TABLE OF AUTHORITIES

Decisions below — Page

Morro v. City of Birmingham, 117 F.3d 508, *rehearing and rehearing en banc denied*, —— F.3d —— (11th Cir. 1997) ..... *passim*

Morro v. City of Birmingham, 39 F.3d 325 (11th Cir. 1994) (table) 5

Morro v. City of Birmingham, 897 F. Supp. 553, 1995 U.S. Dist. LEXIS 13142 (N.D. Ala. 1995) .. 2, 5

Morro v. City of Birmingham, 926 F. Supp. 1033, 1996 U.S. Dist. LEXIS 7403 (N.D. Ala. 1996) 2

Morro v. City of Birmingham, 1996 U.S. Dist. LEXIS 7404 (N.D. Ala. 1996) 2

Other judicial decisions

Board of County Commissioners of Bryan County v. Brown, —— U.S. ——, 117 S.Ct. 1382 (1997) .. 3, 13

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 8

Buckner v. Toro, 116 F.3d 450 (11th Cir. 1997) 13

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 3, 6, 11, 14

Day v. Liberty National Life Ins. Co., 122 F.3d 1012 (11th Cir. 1997) 13

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 11

McConney v. City of Houston, 863 F.2d 1180 (5th Cir. 1989) 14

Monell v. Dep't of Social Services, 436 U.S. 658 (1978) ..... *passim*

Pacific Indemnity Co. v. Broward County, 465 F.2d 99 (5th Cir. 1972) 8

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 3

Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. Unit B, 1981) 8

Riley v. Newton, 94 F.3d 632 (11th Cir. 1996) 13

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 14

Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996) 14

TABLE OF AUTHORITIES—Continued

Statutes and Rules

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	10
28 U.S.C. §§ 1331, 1343	3
42 U.S.C. § 1983	*passim*
Fed. R. Civ. P. 12	6, 9, 12
Fed. R. Civ. P. 16	i, 5, 6, 8, 9
Fed. R. Civ. P. 50	i, 6, 7, 11, 12
Fed. R. Civ. P. 56	4, 5, 9, 12

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Birmingham, Alabama, respectfully prays that a writ of certiorari issue to review the order and mandate of the United States Court of Appeals for the Eleventh Circuit, *Morro v. City of Birmingham,* 117 F.3d 508 (11th Cir. July 21, 1997), *rehearing and rehearing en banc denied,* —— F.3d —— (11th Cir. September 15, 1997).

OPINIONS BELOW

The July 21, 1997, decision of the United States Court of Appeals for the Eleventh Circuit, reported at 117 F.3d 508 (11th Cir. 1997), is reproduced in Appendix A [1a-22a]. The September 15, 1997, order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing en banc, reported at —— F.3d ——

(11th Cir. 1997) (table), is reproduced in Appendix C [53a-54a]. The relevant orders of the United States District Court for the Northern District of Alabama are reproduced in Appendix B [23a-52a], including the following orders which are officially or unofficially reported: the March 23, 1995, order and opinion denying Petitioner's second motion for summary judgment, 897 F.Supp. 553, 1995 U.S. Dist. LEXIS 13142 [23a-30a]; the April 12, 1996, order and opinion denying Petitioner's motion for judgment as matter of law, 926 F.Supp. 1033, 1996 U.S. Dist. LEXIS 7403 [31a-51a]; and the April 17, 1996, supplement to that opinion, 1996 U.S. Dist. LEXIS 7404 [51a-52a]. Other relevant parts of the record are reproduced in Appendix D [58a-96a].

JURISDICTION

The panel opinion of the United States Court of Appeals for the Eleventh Circuit was issued on July 21, 1997. Petitioner City of Birmingham timely sought rehearing, or rehearing en banc, which was denied on September 15, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a suit under 42 U.S.C. § 1983 by a police officer, Scott Thomas Morro, against the City of Birmingham ("Petitioner" or "the City"). Morro claimed that his constitutional rights were violated by a disciplinary suspension. Jurisdiction was present in the United States District Court for the Northern District of Alabama under 28 U.S.C. §§ 1331 and 1343.

In the course of affirming a $150,000 judgment against the City, the U.S. Court of Appeals for the Eleventh Circuit noted near-certainty that the imposition of liability on the City violated this Court's repeated holding that municipalities are liable under § 1983 only where the constitutional deprivation was caused by a city "policy" or "custom" which had the force of law. 117 F.3d at 510, 515 [2a, 12a-13a]. *See, e.g., Monell v. Dep't of Social Services,* 436 U.S. 658 (1978); *Pembaur v. City of Cincinnati,* 745 U.S. 469 (1986); *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Board of County Commissioners of Bryan County v. Brown,* —— U.S. ——, 117 S.Ct. 1382 (1997).[1]

Despite the fact that this verdict was contrary to that precedent, the Court of Appeals upheld the verdict based on the conclusion that the City had waived what the Court

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[1] The Court of Appeals was undoubtedly correct in suggesting that the City would not be liable on a proper application of governing principles of law. The suspension of which Morro complains was reversed by the Jefferson County Personnel Board, which sits in review of such disciplinary suspensions. Thus it cannot by any stretch of the imagination be said that the Police Chief was the "final policymaker" for purposes of that suspension. *See City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988) (disciplining officer was not "final policymaker", and therefore did not give rise to municipal liability, where his decisions were subject to review by a personnel board). Accordingly, the City is not liable; and Question #3 presented by this Petition is therefore included so that, ultimately, this Court could render final judgment in favor of the City rather than remanding.

of Appeals repeatedly called the "*Monell defense* (italics added). *See, e.g.*, 117 F.3d at 515, 516 & n.3 [13a-16a].

The finding of a waiver of the issue was remarkable, as the City had raised the issue repeatedly, literally from the first opportunity. The City's very first filing upon being served with the Complaint was a Motion to Dismiss, in which the City argued (inter alia) that

> The complaint fails to state any official policy, practice, or custom of the City of Birmingham which resulted in a violation of plaintiff's rights protected by the United States Constitution . . . or the laws of the United States . . . *Monell v. New York City Department of Social Services,* 436 U.S. 658; 98 S.Ct. 2018 (1978).

[56a]. The City' motion to dismiss was granted, with the plaintiff given leave to replead.

The amended complaint then alleged, inter alia, that former Chief of Police Deutcsh (who imposed the suspension) was "acting . . . as a policy maker for the City of Birmingham . . ." Amended Complaint ¶ 9[62a]. *See also* ¶¶ 13, 15, 17 (alleging that Deutcsh was "official policy maker of the City") [63a-64a]. The City, in its Answer, denied the material allegations of each of those paragraphs of the Amended Complaint. [69a-70a]. It is notable that the plaintiff did not allege that the City was liable pursuant to the "custom" avenue of municipal liability, but merely alleged that the City was liable on the theory that Deutcsh was the "policymaker" for the City with regard to the acts at issue.

The City later moved for summary judgment under Fed. R. Civ. P. 56, arguing (inter alia) that

> Plaintiff's complaint against Defendant City of Birmingham fails to allege a 'policy or practice' of the City of Birmingham, to violate plaintiff's or others' constitutional rights. . . . The plaintiff's basis for liability against Defendant, City of Birmingham, is

> predicated solely on the doctrine of 'Respondeat Superior'. This may not form the basis for the liability of a municipality under 42 U.S.C. § 1983.

[72a]. This was obviously an invocation of the *Monell* limitation on municipal liability, as the District Court recognized. *See* March 23, 1995, order and opinion denying Petitioner's second motion for summary judgment, 897 F.Supp. at 556, 1995 U.S. Dist. LEXIS 13142 *9-*10 [29a] ("The City's earlier denied motion for summary judgment pointed out that Morro had not alleged a policy or practice by the City to similarly violate plaintiff's or others' constitutional rights or that the liability sought to be imposed on the City is predicated on a theory of respondeat superior contrary to the teaching of *Monell v. Dept. of Soc. Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).").

On the same day that Rule 56 motion was filed, a first pretrial order was entered under Fed. R. Civ. P. 16. [75a-78a]. Plaintiff's submission of his position in that order stated (inter alia) that plaintiff adopted the allegations in his complaint, and that "Plaintiff avers that defendant Deutcsh . . . [was] acting . . . as a policy maker for the City of Birmingham." The City, in its position, denied each and every material allegation of the complaint (which, as noted above, included the repeated allegation that Deutcsh was an official policy maker for the City with regard to the suspension). Pretrial Order, April 20, 1993, ¶¶ 6(b), 6(c) [76a-77a].

After a successful appeal by Deutcsh in his individual capacity from the denial of his motion for summary judgment based on qualified immunity (*Morro v. City of Birmingham,* 39 F.3d 325 (11th Cir. 1994) (table)), the case returned to the District Court. A second pretrial order was entered under Fed. R. Civ. P. 16. [79a-82a]. This time, neither party specifically made any mention of the *Monell* "policy" limitation on municipal liability under § 1983; plaintiff adopted the allegations of his com-

plaint, and the City denied those allegations. Pretrial Order, April 5, 1995, ¶¶ 6(b), 6(c) [80a-81a].

As the City had been unsuccessful in seeking judgment in its favor based on the *Monell* issue under Rules 12 and 56, the case proceeded to trial. At that trial, the City moved for judgment as a matter of law under Rule 50(a) based on the "policy" doctrine, citing *Praprotnik*. [Transcript, 83a-90a]. The District Court laid to rest any possible issue of timeliness of that contention, stating "I'm not faulting you for not having articulated it sooner . . . Let's renew or allow you [counsel for the City] to reimpose the 50(a) motion in light of the argument that Chief Deutcsh was not the final decision maker and therefore was not the City of Birmingham." [84a]. However, after a discussion of the merits of the *Monell* issue, the District Court denied the City's Rule 50 motion. [90a].

The City renewed its motion after the verdict was entered, again based (inter alia) on the "policy" doctrine under *Monell*. [91a-96a]. That motion, too, was denied. In denying it, the District Court for the first time faulted the City for the way in which it presented the issue; the District Court held that the City had waived (or was "judicially estopped" from relying on) the *Monell* "policy" issue. [45a].

The Court of Appeals, in affirming, held that the City had waived the issue by allegedly failing to preserve it in the second Rule 16 pretrial order. 117 F.3d at 515-16 [13a-16a].

The City requested rehearing, or rehearing en banc; that request was denied. [53a-54a].

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals, as explained in its decision, was that the City had waived the *Monell* issue by failing to raise it specifically in the second pretrial order entered in this case. As shown in the following

sections, that decision conflicts with precedent from this Court, and conflicts with precedent from other federal Circuits. Accordingly, given the importance of this issue, review by certiorari is warranted.

I. THE DECISION BELOW IS NECESSARILY BASED ON THE VIEW THAT THE *MONELL* "POLICY" LIMITATION ON MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983 IS A DEFENSE RATHER THAN AN ELEMENT OF PLAINTIFF'S CLAIM.

In order to see that the decision below is contrary to relevant decisions of this Court and of other courts, it is first necessary to understand the rationale for the decision below: the Court of Appeals' decision is *necessarily* based on the view that the *Monell* limitation on municipal liability is a *defense* rather than an element of the cause of action which a plaintiff must prove.

The first indication that the Court of Appeals deemed the *Monell* issue to be a defense—rather than an element of plaintiff's claim—is the language used by the Court of Appeals; it made repeated reference to what it called the "*Monell defense*". *See, e.g.*, 117 F.3d at 512 [7a] (noting that the City's initial Fed. R. Civ. P. 50 motion did not rely on "a *Monell* defense"), *id.* at 512 [7a] (stating that "the district court did not respond favorably to the City's belated attempt to raise a *Monell* defense"); *id.* at 513 [8a] (quoting district court's reference to a "*Monell* defense"); *id.* at 515 [13a] (indicating that the City had "failed to identify its potentially available *Monell* defense as an issue at the pretrial conference"); *id.* at 515 [13a] (referring, in section heading 2, to "The City's Failure to Preserve its *Monell* Defense"); *id.* at 516 [15a] (referring to "the final policymaker defense"); *id.* at 516 [15a] (affirming the district court's decision not to "accommodate presentation of the *Monell* defense"); *id.* at 516 n.3 [16a] (referring to the "*Monell* defense"). This choice of words was no accident; it was critical to the reasoning of the Court of Appeals to portray the *Monell* issue as a

defense rather than an element of the plaintiff's cause of action, in order to hold that the City (rather than the plaintiff) had waived the issue by failing to mention it in the second pretrial order.

The second indication that the Court of Appeals deemed the *Monell* issue to be a defense—rather than an element of plaintiff's claim—is that this is the only way to read the Court of Appeals' decision so as to make it consistent with prior circuit precedent regarding the waiver of issues in pretrial orders under Fed. R. Civ. P. 16. That is, Fifth Circuit precedent from those days when Alabama was part of the Fifth Circuit—precedent which was immediately adopted as binding by the Eleventh Circuit upon its creation, *see Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981)—clearly holds that "Nothing in Rule 16 F. R. Civ. P. 16 . . . suggests that a party waives or admits an issue as to which his opponent has the burden of proof by failing to include the issue in his pretrial stipulated list of remaining issues." *Pacific Indemnity Co. v. Broward County,* 465 F.2d 99, 103 (5th Cir. 1972). "To hold . . . that the County waived [an issue] because the County failed to remind [plaintiff] in the pretrial stipulation that [plaintiff] still had to prove [the issue] would strain the logic of our adversarial system and would destroy much of the usefulness of a pretrial order as a device to reduce and limit issues at trial." *Id.* at 104. *See also Ramada Development Co. v. Rauch,* 644 F.2d 1097, 1110-11 (5th Cir. Unit B, 1981) (adhering to *Pacific Indemnity*'s holding on this point). Therefore, in order to have the decision below make any sense under binding Circuit precedent, the decision below *must* be read as holding that the *Monell* limitation on municipal liability under § 1983 is an affirmative defense—i.e., an issue on which the municipality bears the burden of proof —rather than an element of plaintiff's claim.

The third indication that the Court of Appeals deemed the *Monell* issue to be a defense is that this is the only

rationale which would logically give rise to the holding that the City waived the *Monell* issue. That is, the pretrial order on which the Court of Appeals relied—which was the second Rule 16 order in the case—shows that *neither* party made specific mention of the *Monell* issue, but *both* parties in effect adopted the positions stated in their pleadings. Plaintiff stated, "Plaintiff's positions are set forth in detail in the complaint which is adopted as if fully set forth herein." The City, for its part, "den[ied] each and every material allegation of plaintiff's complaint filed in this cause." The Amended Complaint, in turn, contained Plaintiff's allegation that Chief Deutcsh was acting as the City's "policy maker," and the City's Answer denied that allegation. Therefore, where *neither* party made specific reference to *Monell* but *both* parties adopted by reference their previously stated positions on the subject, a finding of waiver by the City is *necessarily* based on the belief that it was the City's, rather than the Plaintiff's, burden to raise the issue. This is particularly so, as the City had already invoked the *Monell* issue in motions under Rules 12 and 56; the Court of Appeals obviously believed that it was the City's obligation to raise the issue *again* in the second pretrial order. That belief, again, necessarily implies the view that the *Monell* issue is an affirmative defense rather than an element of plaintiff's claim. For if the issue were seen as an element of plaintiff's claim, the penalty for *both* parties' failure to refer specifically to the issue could not logically fall on the defendant.

Although the opinion of the Court of Appeals included various other references to portions of the proceedings below which might be thought to support the "waiver" argument, those references do not obscure the fact that the holding of the Court of Appeals was simply that the City had waived the *Monell* issue *in the second Rule 16 pretrial order*. For instance:

• The Court of Appeals described the City's initial motion to dismiss as having been based "primarily on the ground that [the complaint] was not supported by specific factual allegations." 117 F.3d at 511 [4a]. This cannot obscure the fact that the City specifically relied on the *Monell* limitation on municipal liability in that motion, its very first filing in the case. [56a]. (In light of this fact, it is impossible to accept the District Court's statement, [46a], that the City "successfully conceal[ed] [its position on the *Monell* issue] for four years.").

• The Court of Appeals' description of the City's initial motion for summary judgment as having been directed "on the merits and, alternatively, on grounds of qualified immunity [for an individual defendant]", 117 F.3d at 511 [4a], cannot obscure the fact that the City specifically relied on the *Monell* issue in that motion (as the District Court recognized, 29a).

• The Court of Appeals' statement that the City did not rely on the *Monell* issue in its second motion for summary judgment, 117 F.3d at 511 [5a], is therefore of no weight; a defendant surely does not waive an issue by raising it in one, rather than two, motions for summary judgment. Likewise weightless is the Court of Appeals' quotation of a part of that second motion, in which the City stated that Chief Deutcsh, as the Chief of Police, was "entitled to and obligated to discipline employees of the department . . .", 117 F.3d at 511 [5a]. That statement, of course, does not amount to a concession that Deutcsh was the *final policymaking authority* for such discipline; and the Court of Appeals did not hold that it was such a concession.

• The Court of Appeals noted, 117 F.3d at 511 [5a-6a], that the City sought to appeal the denial of its second motion for summary judgment under 28 U.S.C. § 1292(b), without relying on the *Monell* issue. However, there is certainly no authority to suggest that a failure to raise such an issue under § 1292(b) is a waiver of the issue;

and the Court of Appeals did not suggest such an unsupportable holding.

• The Court of Appeals noted that, during the trial itself, the City did not discuss the *Monell* issue. 117 F.3d at 512 [7a]. The District Court, similarly, noted that the City had not referred to the issue in opening statement or in the presentation of evidence. [36a-37a]. Of course, it was entirely proper for the City not to inject the *Monell* issue before the jury, because it was an issue for the court. Plaintiff's theory as stated in his complaint—and adopted in the pretrial order—was that he would impose liability on the City through the "final policymaker" portion of the *Monell* doctrine. And that issue is one of law for the court. *Praprotnik*, 485 U.S. at 123; *Jett v. Dallas Indep. Schol Dist.*, 491 U.S. 701, 737 (1989). Thus the City did not waive the issue in not arguing it to the jury; and the Court of Appeals did not hold that this was waiver.

• The Court of Appeals noted that the City did not, at first, rely on the *Monell* issue in making its Rule 50(a) motion. 117 F.3d at 512 [7a]. But, as discussed above, the City did raise the issue later during trial and the District Court—without apparent objection from Plaintiff—allowed the City to reopen its Rule 50 motion to include the *Monell* issue. [84a]. The Court of Appeals did *not* hold that the District Court erred in so doing, or that the City's Rule 50 motion was the occasion of the waiver.

It is unfortunate that the City has had to dispel possible confusion from those remarks by the Court of Appeals, as *none* of those remarks was the basis for the Court of Appeals' holding; instead, the Court of Appeals' holding was based squarely on the theory that the City had waived the *Monell* issue in the second pretrial order. 117 F.3d at 515-16 [13a-16a].[2] As shown herein, that

[2] The only procedural step mentioned in the Court of Appeals' legal analysis of the waiver issue, other than the second pretrial order, was a statement by the district court during the trial that

holding necessarily relies on the view that the *Monell* issue is a "defense" rather than an element of plaintiff's claim.

The City does not deny, of course, that it—like all litigants—had to invoke an issue if it hoped to prevail on that issue. But the City undisputedly did that, with regard to the *Monell* issue, both before and after the second pretrial order; the City denied the *Monell* allegation in its Answer, and raised the issue by motions under Rules 12, 56, and 50 (the latter motion, again, having been treated as timely by the District Court during the trial).

Therefore, again, the only way one could hold that the City waived the issue in the second pretrial order is by holding that the *Monell* issue is a "defense", akin to a statue of limitations, arbitration and award, contributory negligence, or so forth, rather than being an element of plaintiff's claim.[3] That is the essence of the decision

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the City had conceded the *Monell* issue, and the City's failure to correct that misimpression immediately. 117 F.3d at 516 [15a]. The Court of Appeals, however, did *not* hold that this was the occasion for the City's waiver; instead, the Court of Appeals (having already held the issue to have been waived in the pretrial order) indicated that this conversation was an additional basis for not *modifying* the pretrial order. *Id.*

It is also worth noting that the City's objection to certain "pattern and practice witnesses", which was the occasion for the district court's statement, was *not* inconsistent with the City's reliance on the *Monell* doctrine. As noted above, Plaintiff's pleadings and pretrial position relied on the *final policymaker* route to municipal liability, and not on a "custom" theory; therefore, any "pattern and practice" was irrelevant to the issue of municipal liability as framed by the pleadings. *See Praprotnik*, 485 U.S. at 126 ("a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it.").

[3] Further underscoring the view of the Court of Appeals that the *Monell* doctrine is a "defense", the Court of Appeals has since cited its decision in this case in support of a conclusion that a party waived the statute of limitations defense by not raising it in the

below; as shown in the following section, that holding requires review and correction by this Court.

II. THIS COURT AND OTHER COURTS HAVE REJECTED THE VIEW THAT THE *MONELL* "POLICY" ISSUE IS AN AFFIRMATIVE DEFENSE, HOLDING INSTEAD THAT IT IS AN ELEMENT WHICH THE PLAINTIFF MUST PROVE; THIS IS AN IMPORTANT ISSUE AS TO WHICH THIS COURT SHOULD RESOLVE THE CONFLICT.

In treating the *Monell* limitation on municipal liability as a defense which a municipality bears the burden of preserving, the decision below conflicts with decisions of this Court and of other federal Circuits which recognize that the Monell issue is part of what the plaintiff must prove in order to impose liability on a municipality under 42 U.S.C. § 1983.[4] Certiorari is therefore necessary in order to resolve this conflict.

Most recently, this Court has held in *Board of County Commissioners of Bryan County v. Brown* that "in *Monell* and subsequent cases, we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." —— U.S. at ——, 117 S.Ct. at 1388. This clearly reflects that the *Monell* issue is an element of

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pretrial order. *See Day v. Liberty National Life Ins. Co.*, 122 F.3d 1012, 1016 n.5 (11th Cir. 1997). This parallel treatment of the *Monell* issue and the statute of limitations (a classic "affirmative defense") reflects the Court of Appeals' reasoning in *Morro*.

[4] Indeed, in earlier cases even the Eleventh Circuit apparently recognized that the *Monell* issue is an element of plaintiff's claim, as to which plaintiff has the burden of proof, rather than being a defense. *Riley v. Newton*, 94 F.3d 632, 637-39 (11th Cir. 1996); *Buckner v. Toro*, 116 F.3d 450, 453 (11th Cir. 1997) ("the requirement of a municipal policy or custom constitutes an essential element of a § 1983 claim that a plaintiff must prove in order to establish municipal liability.").

plaintiff's claim against the municipality, rather than a defense. To the same effect was the plurality holding in *City of St. Louis v. Praprotnik* that "[t]he city cannot be held liable under § 1983 unless respondent proved the existence of an unconstitutional municipality policy." 485 U.S. at 128.

Following these decisions of this Court, the Fifth Circuit held in *McConney v. City of Houston*, 863 F.2d 1180, 1184 n.2 (5th Cir. 1989) that "[i]n a section 1983 case, the burden of proving the existence of an unconstitutional municipal policy or established custom rests upon the plaintiff." Likewise, in *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996), the Ninth Circuit held that "[a]s a prerequisite to establishing Section 1983 municipal liability, the plaintiff must satisfy one of three conditions," going on to list three ways of meeting the *Monell* prerequisites for municipal liability, among them (analogous to the contention in Respondent's complaint) that "the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy."

As the decision in this case shows, this conflict is no mere academic dispute. The choice between deeming an issue to be a "defense" rather than an element of the claim has important ramifications, not only as to waiver but also (for instance) as to burdens of proof and the

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[5] It is possible that some confusion could arise from this Court's description of the *Monell* issue in *Swint v. Chambers County Comm'n*, 514 U.S. 35, 43 (1995) as a "mere defense to liability". In context, it is clear that the Court was merely differentiating the *Monell* issue from a true *immunity* (such as qualified immunity), explaining that the *Monell* issue is not an appealable "collateral order"; *Swint* did not purport to place the burden on the defendant in the *Monell* issue. However, to the extent that the quoted phrase from *Swint* might generate confusion, that is all the more reason for clarification by certiorari in this case.

parties' respective burdens in seeking or opposing summary judgment. Thus the choice between the Eleventh Circuit's approach, and the approach of this and other courts, becomes a critical issue in many cases.

While correction of such fundamental and simple error may be an unfortunate part of this Court's caseload, it is a necessary part; this Court from time to time is in the position of restating and clarifying fundamental principles. The City respectfully submits that, in this case, this Court is once again in that position; the decision below is based on a fundamental misunderstanding of one of the basic principles of § 1983 jurisprudence, and so review is necessary.

CONCLUSION

For the reasons stated herein, Petitioners respectfully submit that a writ of certiorari should be granted to review the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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